

The Appeals Board adopted the stipulations listed in the Administrative Law Judge's Award. In addition, the parties, at the regular hearing, stipulated to a whole body permanent functional impairment rating of 15 percent.

**ISSUES**

The Administrative Law Judge limited claimant to an award based on a scheduled right upper extremity injury. Claimant contends he also suffered an injury to his neck and right shoulder. Therefore, claimant contends he is entitled to disability benefits based on work disability.

In contrast, respondent contends claimant failed to prove he suffered an accidental injury that arose out of and in the course of his employment. However, respondent also contends that if claimant's injury is determined to be work related, then claimant is entitled to only a scheduled right upper extremity injury as found by the Administrative Law Judge.

The parties raised the following issues for Appeals Board review:

- (1) Are the opinions of nontestifying physicians contained in a stipulation filed by the parties on February 14, 1997, admissible evidence?
- (2) Did claimant sustain an accidental injury that arose out of and in the course of his employment with respondent on June 17, 1993?
- (3) What is the nature and extent of claimant's disability?
- (4) Was claimant temporarily and totally disabled from May 5, 1995, through May 6, 1996?
- (5) Is respondent entitled to a K.S.A. 44-510a (Ensley) credit?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Claimant started working for respondent as an environmental compliance technician in December of 1992. Claimant was assigned on a contract basis to work for Midland Loan Services in Kansas City, Missouri. Claimant's job was to review certain files on property acquired by Midland Loan Services for potential environmental liability.

Claimant's job duties, the majority of the time, were sedentary duties of reviewing files, writing reports, and inputting data in a computer. However, claimant was also required to obtain from storage, records filed in bank boxes that weighted anywhere from 30 to 100 pounds. Claimant testified he strained his right arm, neck, and shoulder while lifting three large folding tables and later lifting several of the heavy bank box files of

records at work on June 17, 1993. Claimant testified his right arm and neck became symptomatic approximately one hour after the time he had lifted the tables. Claimant testified he eventually had to leave work early because of the increasing pain and discomfort.

Claimant's wife testified that claimant came home from work early on June 17, 1993, in extreme pain. The accident occurred on Thursday, and because of the continuing pain and discomfort, claimant did not return to work on Friday. Claimant did try to return to work on Monday but could not tolerate the pain and had to leave work.

On June 28, 1993, claimant sought medical treatment in Topeka, Kansas, where he was living at the time. Orthopedic surgeon, David E. Thurston, M.D., saw claimant for the first time on June 28, 1993.

Claimant was taken off work by Dr. Thurston on July 9, 1993. Dr. Thurston treated claimant conservatively with medication, physical therapy, and immobilized his right arm in a sling. Dr. Thurston referred claimant for a consultation with neurosurgeon K. N. Arjunan, M.D., on August 16, 1993. Claimant was then referred on October 14, 1993, to John A. Pazell, M.D., an orthopedic surgeon in Lenexa, Kansas.

Dr. Pazell initially saw claimant on November 16, 1993, and took over the care and treatment of claimant from Dr. Thurston on December 2, 1993. Dr. Pazell diagnosed claimant with cervical spondylosis and cubital tunnel syndrome. On February 4, 1994, the doctor performed a right ulnar nerve transposition. During claimant's recovery from the elbow surgery, claimant continued to complain of headaches and discomfort in the neck area. Dr. Pazell referred claimant for treatment of his cervical discomfort and headaches to Glenn M. Amundson, M.D., an orthopedic surgeon at the University of Kansas Medical Center in Kansas City, Kansas.

Dr. Amundson first saw claimant on November 17, 1994. The doctor diagnosed claimant with C5-6 disc degenerative changes with deferred bulging or protrusion of the disc. Dr. Amundson recommended claimant undergo an anterior cervical discectomy and C5-6 fusion. Claimant, however, decided against the surgical procedure. Dr. Amundson rated and released claimant from his care on May 23, 1996.

On the date of the regular hearing, March 13, 1997, claimant had not received any further medical treatment for his injuries. At the regular hearing, claimant was unemployed and had only worked, since the accident, part-time for Pizza Hut for about three months.

(1) The parties, on February 14, 1997, filed in this case a Stipulation Concerning Medical Records. The stipulation was signed by both attorneys representing the parties. Contained in the stipulation, the parties agreed "[t]hat the medical records which are attached, may be admitted into evidence in this claim without objection and without further

foundation . . . ." Thereafter, the medical records attached to the stipulation were listed and identified.

The record in this claim contains the testimony of two physicians: Glenn M. Amundson, M.D., who testified at claimant's request; and Michael J. Poppa, D.O., who testified at the request of the respondent. Both physicians were supplied with claimant's medical treatment records before they examined the claimant. After the medical records were stipulated into the record, the respondent, at various times during the taking of deposition testimony, objected to any reference made to the medical opinions of the nontestifying physicians despite their being contained in the medical records stipulation.

Respondent argues the stipulation admitting the medical records into evidence is vague and ambiguous. Furthermore, the respondent asserts the admission of nontestifying physician opinions pursuant to the stipulation is clearly prejudicial against the respondent because it was denied the opportunity to cross-examine the physicians.

The Workers Compensation Act requires the health care provider to testify before a report of any examination of any employee is admissible as competent evidence in a claim. See K.S.A. 44-519. Additionally, K.A.R. 51-3-5a generally provides that medical reports or other records shall be considered at a preliminary hearing. However, the medical reports shall not be considered as evidence for a final award, unless all parties stipulate to the reports or unless the report is later supported by the testimony of the physician making the report. In this case, the medical record stipulation was not part of a preliminary hearing.

Recently, the Kansas Supreme Court held that opinions formed by vocational rehabilitation experts relying upon evidence from nontestifying health care providers are based on an insufficient foundation and are prohibited by K.S.A. 44-519. Roberts v. The J.C. Penney Co., \_\_\_ Kan. \_\_\_, Syl. ¶ 5, 949 P.2d 613 (1997). Although medical experts may rely upon the reports of nontestifying physicians in forming their opinions, this differs from allowing a vocational rehabilitation expert to do so. Roberts at Syl. ¶ 6.

The Appeals Board finds the stipulation filed by the parties which contained medical treatment records of the claimant is not vague and ambiguous. The stipulation clearly states "[t]hat the medical records which are attached, may be admitted into evidence in this claim without objection and without further foundation . . . ." The Administrative Law Judge, at the regular hearing, cited the medical records stipulation as part of the record without an objection from the respondent. Furthermore, the respondent provided both its medical expert and its vocational expert with copies of those same medical records for review before either expert examined or interviewed the claimant. The Appeals Board finds the parties stipulated the medical records into evidence without foundation, therefore, the health care provider's opinions contained in such medical records are admissible without the necessity of their deposition testimony.

(2) Claimant alleged he suffered work-related injuries on June 17, 1993, when he lifted three folding tables and later a number of bank boxes full of files. Claimant testified he did continue to work after the accident but had to leave work early because of the pain and discomfort in his right arm, shoulder, and neck.

Respondent, on the other hand, argues claimant was initially injured on June 17, 1993, and then suffered a recurrent injury on June 23, 1993, that caused him to leave work and seek medical treatment. The respondent asserts that claimant should be denied benefits because the record supports a finding that the second accident, that occurred on June 23, 1993, was the disabling accident and not the first accident on June 17, 1993.

The Appeals Board disagrees and finds claimant has proved through his testimony and through his medical treatment records as set forth below that he sustained his disabling work-related injuries as a result of the June 17, 1993, accident and not on June 23, 1993.

Claimant was injured on Thursday, and he did not return to work until Monday. Claimant testified he did not reinjure himself on Monday but had to leave work simply because he could no longer perform his job duties because of the injuries that he received on June 17, 1993.

Claimant sought medical treatment with Dr. Thurston, an orthopedic surgeon in Topeka, Kansas. Dr. Thurston first saw claimant on June 28, 1993. Dr. Thurston's medical note on that day indicates that claimant was injured a-week-and-one-half ago on June 23, 1993. However, Dr. Thurston corrected the June 23, 1993, date in his medical note of July 9, 1993. He indicated the June 23, 1993, date was an error and the correct date of claimant's accident was June 17, 1993.

(3) The Administrative Law Judge found and the respondent agrees the record established that the claimant suffered a work-related injury to only his right upper extremity. The Administrative Law Judge found claimant's cervical problems unrelated to his employment.

In support of this conclusion, the Administrative Law Judge found claimant did not make complaints of neck pain for at least two months following the accident. The Administrative Law Judge found the medical opinions of occupational medicine physician Michael J. Poppa most persuasive. Dr. Poppa was retained by the respondent and saw claimant on one occasion, October 1, 1996. Dr. Poppa's examination and evaluation of claimant occurred more than three years and three months following claimant's June 17, 1993, work-related accident. Dr. Poppa concluded there was no relationship between claimant's preexisting cervical spine degeneration and his June 17, 1993, work-related accident. Whereas, the Administrative Law Judge gave less weight to the opinions of two of claimant's treating physicians, orthopedic surgeons Dr. Amundson and

Dr. Pazell. Both of these physicians attribute the aggravation of claimant's preexisting degenerative cervical disc condition and current pain syndrome to claimant's June 17, 1993, lifting accident.

The Appeals Board disagrees with the Administrative Law Judge's conclusion and the respondent's argument that the record supports the finding that claimant's cervical and shoulder symptoms are not related to his work. The Appeals Board finds claimant's testimony and the medical opinions of Dr. Amundson and Dr. Pazell more credible and persuasive. This evidence establishes that claimant suffered a cervical spine injury as well as the right elbow injury as a result of the June 17, 1993, accident.

Claimant testified he had previously injured his right elbow driving nails in 1990 while working as a carpenter following hurricane damage while he was living in St. Croix, American Virgin Islands. Claimant also testified, before the June 17, 1993, accident, that following heavy physical labor he had some aches and pains in his shoulders. Claimant testified he had been asymptomatic, however, for at least six months before his June 17, 1993, accident.

After this accident, claimant described he had a burning sensation in not only his right elbow, but he also had pain shooting into his shoulder and neck. At the regular hearing held on March 13, 1997, claimant testified he still remained symptomatic with pain in his neck, right shoulder, and right elbow.

As previously noted, the first medical treatment claimant received for his injuries was on June 28, 1993, with Dr. Thurston. According to Dr. Thurston's medical records, claimant complained of pain in his right elbow and also right shoulder. Claimant was next seen on July 9, 1993, and the medical notes indicate that claimant again had pain in both his right elbow and right shoulder.

Dr. Thurston ordered claimant to undergo an MRI examination of his cervical spine on August 27, 1993. The MRI examination showed degenerative disc disease at C5-C6. Dr. Thurston prescribed treatment in the form of cervical traction and a cervical pillow. The doctor, in his medical note dated October 4, 1993, concluded claimant had preexisting cervical changes and the injury aggravated those changes causing claimant to become symptomatic. Dr. Thurston referred claimant for consultation to neurosurgeon, K. N. Arjunan, M.D., who saw claimant on August 16, 1993. Again claimant reported shoulder complaints in addition to right elbow complaints.

Claimant was under Dr. Thurston's care from June 28, 1993, until claimant was referred to John A. Pazell, M.D., an orthopedic surgeon in Lenexa, Kansas. Dr. Pazell first saw claimant on November 16, 1993. After examining the claimant and reviewing the record from his previous medical treatment, Dr. Pazell diagnosed cervical spondylosis and right cubital tunnel syndrome. Dr. Pazell, on February 4, 1994, performed a right ulnar nerve transposition. While recovering from this elbow surgery, claimant continued to have

complaints of neck pain and headaches. The doctor prescribed medication for those complaints and for the muscle spasms in claimant's neck. Claimant's neck complaints were also treated with a number of epidural steroid injections but with no significant relief.

In a letter dated April 8, 1994, to respondent's insurance carrier's medical management nurse, Dr. Pazell attributed claimant's neck pain and headaches to his right upper extremity injury. Finally, because claimant was not responding to conservative treatment, Dr. Pazell referred claimant to board certified orthopedic surgeon Glenn M. Amundson, M.D., a physician and associate professor of Spine Service at the University of Kansas Medical Center. Dr. Amundson first saw claimant on November 17, 1994.

Dr. Amundson concluded that the source of claimant's neck pain and headaches was his severely degenerative C5-6 disc with severe diffused bulging. Furthermore, since claimant had undergone numerous conservative treatment modalities without improvement, Dr. Amundson recommended claimant undergo a provocative discography. Claimant underwent this invasive procedure on August 14, 1995. The discography exactly reproduced claimant's pain at the C5-6 level.

Accordingly, Dr. Amundson then offered surgery, but claimant declined because the surgery success rate was only 70 percent and there was also possibility of complications due to a breakdown at the adjacent vertebra levels. Dr. Amundson found claimant suffered from axial pain in the neck, upper shoulders, and parascapular regions. The discography verified the source of the axial pain at the C5-C6 vertebra level.

Claimant was last seen by Dr. Amundson on May 23, 1996. At that time, Dr. Amundson opined that claimant was at maximum medical improvement. The doctor related claimant's pain syndrome to his work-related accident, with part related to the cubital tunnel pain syndrome and part related to the cervical pain syndrome. The doctor placed permanent restrictions on claimant's work activities. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Amundson opined that claimant had a 16 percent permanent partial impairment to the body as a whole as a result of the work-related injury to his cervical spine.

At the same time that claimant was being treated by Dr. Amundson, the respondent had claimant undergo an independent medical examination on February 17, 1995, by orthopedic surgeon Gael R. Frank, M.D., of North Kansas City, Missouri. Dr. Frank diagnosed ulnar nerve transposition right elbow, cervical spondylosis, and headaches of undetermined etiology. The doctor opined that claimant's work had not caused these conditions but agreed the conditions were aggravated by the June 17, 1993, accident. Dr. Frank did not recommend surgery but instead to continue with conservative therapy. He rated claimant with a 4 percent permanent partial functional disability of the cervical spine and a 5 percent permanent partial disability of the right arm due to the ulnar nerve transposition surgery.

Based upon this testimony, the Appeals Board finds claimant sustained injury to his neck and shoulder, in addition to his right elbow, as a result of the June 17, 1993, accidental injury at work.

(4) The Administrative Law Judge found claimant did not suffer a work-related neck injury and, therefore, found respondent had overpaid claimant temporary total disability benefits from May 5, 1995, through May 6, 1996, or 52 weeks at \$251.44 for a total amount of \$13,074.88. The overpayment amount was credited against the award and the excess was ordered reimbursed to the respondent by the Kansas Workers Compensation Fund.

The claimant declined the surgical procedure offered by Dr. Amundson on January 11, 1996. Although claimant saw Dr. Amundson on three occasions after January 11, 1996, Dr. Amundson offered no further treatment options except to continue on pain medication. The Appeals Board concludes, after claimant declined surgery on January 11, 1996, there was no additional medical treatment available to treat claimant's injuries. Therefore, claimant had met maximum medical improvement and was available for employment within his restrictions. Therefore, the Appeals Board finds respondent is entitled to credit against the award for overpayment of temporary total disability benefits for the 16.43 week period from January 12, 1996, through May 6, 1996, at \$251.44 per week for a total of \$4,131.16.

(5) As previously found above, the Appeals Board has concluded that claimant has sustained a work-related whole body injury. Therefore, claimant is entitled to the higher of his stipulated permanent functional whole body impairment of 15 percent or a work disability.

Claimant's date of accident is June 17, 1993. On that date of accident, the components of the work disability test were contained in K.S.A. 1992 Supp. 44-510(e)(a). Those two components consist of the loss of claimant's ability to perform work and earn a comparable wage in the open labor market.

The claimant presented the testimony of vocational expert James T. Molski on the issue of claimant's work disability. Mr. Molski based his opinions on Dr. Amundson's permanent restrictions of occasional lifting 35 pounds; avoid sustained or awkward cervical posture positions; avoid repetitive pushing, pulling; and avoid any overhead work activities. Utilizing those restrictions, Mr. Molski opined claimant had lost between 30 and 35 percent of his ability to perform work in the open labor market. In regard to wage loss, claimant had attempted to return to work for the respondent but had not been offered employment. The only employment claimant had engaged in since his accident was working for his wife part-time at the Pizza Hut located in his current hometown of Neodesha, Kansas. Mr. Molski, taking into consideration claimant's permanent work restrictions and current job skills, education, and experience, opined that claimant had the ability to earn from \$275 to \$300 per week. This range of post-injury wages were then compared to a preinjury wage of \$335 per week for a 10 to 18 percent wage loss. As noted in the stipulations of



the parties, claimant's preinjury average weekly wage was \$381.60. The Appeals Board finds that when the average weekly wage of \$381.60 is compared with claimant's ability to earn \$287.50 per week, this results in a 25 percent wage loss.

The respondent employed vocational expert Michael J. Dreiling for the purpose of determining claimant's vocational capabilities. Utilizing Dr. Amundson's permanent restrictions, Mr. Dreiling agreed with Mr. Molski's opinion that claimant had lost 30 to 35 percent of his ability to perform work in the open labor market. Conversely, Dr. Poppa did not place any permanent restrictions on claimant. Therefore, based on Dr. Poppa's opinion, Mr. Dreiling found claimant had no labor market loss or wage loss as a result of his work-related injuries. Mr. Dreiling, although admitting the real estate market was somewhat speculative, opined that claimant, because of his previous real estate experience, could earn a comparable wage as a realtor. The claimant had sold real estate in St. Croix about two years before the date of his accident. Claimant did not however have a Kansas real estate license and did not have the necessary education requirements to apply for such license.

The Appeals Board concludes the most persuasive evidence presented on the work disability issue is the opinion of vocational expert James Molski. Mr. Molski based his opinions concerning claimant's labor market loss and wage loss on the permanent restrictions imposed by Dr. Amundson who was very familiar with claimant's injuries because he examined and consulted with claimant from November 17, 1994, through May 23, 1995. The Appeals Board also finds Mr. Molski's opinion, that claimant has the current ability to earn post-injury \$275 to \$300 per week, is more realistic than to speculate as to what the claimant could earn in sales if he obtained a real estate license in a speculative real estate market. Therefore, the Appeals Board finds, that as a result of claimant's June 17, 1993, work-related accident, the claimant has lost 32.5 percent of his ability to perform work in the open labor market and 25 percent of his ability to earn a comparable wage. Giving both of these percentages approximately equal weight, the Appeals Board concludes that claimant is entitled to permanent partial disability benefits based on a work disability in the amount of 29 percent. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990).

(6) The respondent claimed a credit against the award pursuant to K.S.A. 44-510a (Ensley). However, the respondent presented no evidence on this issue and did not argue it in its brief. Accordingly, the Appeals Board denies respondent's request for a credit.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated April 24, 1997, and the Order Nunc Pro Tunc dated May 19, 1997, should be, and are hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Bobby J. Lay, and against the respondent, Aerotek, Inc., and its insurance carrier, Reliance National Indemnity Company, for an accidental injury which occurred on June 17, 1993, and based upon an average weekly wage of \$381.60.

Claimant is entitled to 96.14 weeks of temporary total disability compensation at the rate of \$254.41 per week or \$24,458.98 followed by 318.86 weeks of permanent partial general disability at the rate of \$73.78 per week or \$23,525.49 for a 29% permanent partial general disability, making a total award of \$47,984.47.

As of April 25, 1998, there is due and owing claimant 96.14 weeks of temporary total disability compensation at the rate of \$254.41 per week or \$24,458.98 followed by 157.15 weeks of permanent partial compensation at the rate of \$73.78 per week in the sum of \$11,594.53 for a total of \$36,053.51, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$11,930.96 is to be paid for 161.71 weeks at the rate of \$73.78 per week, until fully paid or further order of the Director.

All remaining orders contained in the Administrative Law Judge's Award that are not inconsistent with this order are adopted by the Appeals Board as if specifically set forth herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 1998.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John M. Ostrowski, Topeka, KS  
Timothy G. Lutz, Overland Park, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director